COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-286

COMMONWEALTH

vs.

KIMBERLY ANN DENAULT.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from her conviction of assault and battery by means of a dangerous weapon causing serious bodily injury.[1] She argues that the trial judge erred in allowing in evidence the victim's statements to the police in a recorded telephone call that took place during the assault. We determine that there was no error and therefore affirm.

Background. At trial, the victim testified that he was standing in front of a parked minivan as he spoke to the police on his cell phone; the defendant was seated in the driver's seat of the minivan. While the victim was still talking to the police on his cell phone, the defendant drove the minivan

[1] The defendant was also convicted of leaving the scene of an accident after causing personal injury; she does not challenge that conviction on appeal. She was acquitted of assault with intent to murder and resisting arrest.

forward, hitting the victim in the midsection. The victim grabbed the windshield wiper to prevent from being pulled under the minivan. With the victim still on the hood, the minivan traveled out of the parking lot, took a right turn and sped up before crashing into the victim's vehicle, which was parked on the street. The prosecutor then played the audio recording of the victim's cell phone call to the police, which included the victim's statement, "she's trying to run me over with her car."[2]

Discussion. The defendant argues that the statement should not have been admitted because no foundation of personal knowledge had been established. As the defendant raises this issue for the first time on appeal, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. McCoy, 456 Mass. 838, 850 (2010).

The judge admitted the victim's statement as an excited utterance, a determination which the defendant does not challenge on appeal. As the defendant correctly notes, the declarant of an excited utterance "must have personal knowledge of the event." Commonwealth v. King, 436 Mass. 252, 255 (2002). Here, the victim was witnessing the event as he relayed it to the police. There can be no question that he had personal knowledge. The defendant's issue is with the precise language

[2] The seven-minute audio recording captured the victim's initial call to the police through to the crash.

used by the victim to relay what was happening to him. Her argument is that the victim could not have had personal knowledge of what the defendant was "trying" to do, in other words -- the defendant's intent.

We think that the jury would have understood that the victim had no way of knowing what was actually in the defendant's mind and was simply relaying his impression of what was happening to him. An excited utterance essentially relates the declarant's perception, which in common speech is typically phrased in terms of a conclusion. See Commonwealth v. Leavey, 60 Mass. App. Ct. 249, 250 (2004) ("he's going to kill me, you have to help me" properly admitted as excited utterance); Commonwealth v. Napolitano, 42 Mass. App. Ct. 549, 554 (1997) (judge did not abuse discretion in admitting as excited utterance victim's statement that defendant had tried to drown her where it characterized and explained victim's "perception of the cause of her hysteria and injuries"). See also Commonwealth v. Patch, 11 Mass. App. Ct. 981, 982 (1981) (victim's testimony repeating her out-of-court statement "[h]e's going to kill me" "would . . . have been admissible as a spontaneous

utterance"). There was no error and so no substantial risk of a miscarriage of justice.

Judgment affirmed.

By the Court (Wolohojian, Neyman & Singh, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: June 17, 2019.

[3] The panelists are listed in order of seniority.